

IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

No. 77-393

THOMAS R. FADELL,
v. *Petitioner,*

MINNEAPOLIS STAR AND TRIBUNE COMPANY, INC.,
GEORGE CRILE, ANNE CRILE, JOHN COWLES, JR.,
RUSSELL BARNARD AND ROBERT SHNAYERSON,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals is unreported and appears as Appendix A to the petition for certiorari. The opinion of the district court is reported at 425 F. Supp. 1075 and appears in Pet. App. C at

1-35. The findings of fact and conclusions of law entered by the district court appear in Pet. App. C at 36-126.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1977. The petition for certiorari was filed on September 13, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether in this libel case brought by a public official, the district court and the court of appeals properly granted summary judgment for respondents.

STATEMENT OF THE CASE

Introduction

This libel action was brought by petitioner, Thomas R. Fadell, who, since 1959, has been the tax assessor for Gary, Indiana. The suit was based on an article which appeared in the November, 1972 issue of *Harper's Magazine* entitled "A Tax Assessor Has Many Friends." Respondents are the author, George Crile, his wife, the Minneapolis Star and Tribune Company, of which *Harper's* is a division, and three individuals associated with the Company and *Harper's*.¹

¹ The three individuals are John Cowles, Jr., President and Board Chairman of the Minneapolis Star and Tribune Com-

On the basis of the record developed during extensive discovery, respondents moved for summary judgment, relying upon *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). The district court granted the motion and wrote a memorandum opinion and entered detailed findings of undisputed facts and conclusions of law. The court of appeals affirmed, adopting the district court opinion,

"including the conclusion that 'a careful review . . . (of the record) reflects no actual malice whatsoever as that term is contemplated in *New York Times v. Sullivan* and its progeny.'" Pet. App. A at 5-6.

Statement of Facts

The author, respondent George Crile, began research on the article in question while working as a reporter for the *Post-Tribune* in Gary. After initial interviews with a man who had formerly worked for Fadell in the Tax Assessor's Office and with a special agent of the Internal Revenue Service, Crile began an extensive and wide-ranging investigation into Fadell's practices as assessor. He interviewed at least 60 people, including, as the district court observed,

"a large number of public officials, leading citizens and experts with respect to tax assessments in Gary, political conditions in Gary and election events in Gary." Pet. App. C at 7, n. 3.

pany, Inc., *Harper's Magazine* Publisher Russell Barnard and *Harper's* Editor-in-Chief Robert Shnayerson.

He reviewed numerous tax assessment records and other public documents relating to operations of the Assessor's Office. He interviewed at least eight former employees of the Assessor's Office.

The picture which emerged, and which is portrayed in the article, was a shocking abuse of the Assessor's Office. Crile learned that Fadell required employees to kick back a percentage of their salary into a fund he maintained; he used employees of the Assessor's Office for personal and political tasks; he padded the payroll with hundreds of temporary employees in election years;² and he used the Assessor's Office to conduct a private business from which he received extensive revenues. Pet. App. C at 93-100.

The most important area of Crile's research concerned Fadell's assessment practices. He found numerous instances of mysterious and unexplained assessment reductions. Documents made available by an IRS agent provided an explanation for many of those reductions. They reported instances of solicitation of bribes or kickbacks in exchange for favorable assessment treatment. They contained examples of companies which, after making payments to Fadell or his businesses, received lowered assessments. Crile

² Crile obtained signed statements from certain of these workers affirming that they were on the Assessor's payroll but did no assessment work. Other people told Crile in tape recorded interviews that the people on the padded payroll were hired to do political work for Fadell. Pet. App. C at 100-105.

personally verified certain of those cases by obtaining tape recorded interviews with people approached for bribes.³

On the basis of that research, Crile wrote a series of articles for the *Post-Tribune*. However, before the articles were published, Crile was fired. Crile later brought the articles to *Harper's*. After reviewing them and looking into Crile's reputation and qualifications, *Harper's* commissioned Crile to write the article in dispute, which was in part derived from the original articles and in part based on additional material. The article was reviewed before publication in detail by *Harper's* editors and by Harper's counsel, all of whom concluded that it was fair and accurate. It was published in the November, 1972 issue of *Harper's*. Pet. App. C at 2-19, 36-41.

Proceedings Below

After the article was published, Fadell filed this action complaining that numerous passages were libelous. Extensive pre-trial discovery ensued. Depositions of 23 witnesses were taken. Crile was interrogated for eight days and the transcript of his deposition covers 1,443 pages. He responded to 341 interrogatories and produced for Fadell's inspection all of his notes and tape recordings of interviews.

³ The district court's Finding No. 30, which covers seven pages (Pet. App. C at 60-67), describes in graphic detail the undisputed facts available to Crile concerning bribes, kickbacks and shakedowns.

After Fadell completed discovery, respondents moved for summary judgment. Crile attached as an appendix to his motion seven volumes of exhibits which contained the sources for each of the disputed statements in the *Harper's* article.*

After receiving extensive memoranda analyzing the evidence, the district court granted summary judgment for respondents. The court carefully reviewed the scope and depth of Crile's investigation. It entered extensive findings of undisputed facts which analyzed the basis for each statement alleged to be libelous. Summarizing the evidence it said:

"the Court finds that, based on the undisputed facts in this record, Crile had support, either from interviews, or documents or both for each of the disputed statements and it further finds that there is no evidence that at the time of publication, Crile knew that any statements were false or entertained any doubt as to the truth of the statements." Pet. App. C at 54.

Likewise the court reviewed the careful editing of the article by *Harper's* (Pet. App. C at 2-19). The court found that there was no evidence that *Harper's* or anyone associated with it knew any statement was

* Volumes I through III, covering 1,128 pages, consist of Crile's interview notes. Volume IV consists of 418 pages of tape recorded interviews. Volume V contains 285 pages of Internal Revenue documents provided to Crile. Volumes VI and VII contain 341 pages of miscellaneous documents relied on by Crile in preparation of the article.

false or had any doubts of the accuracy of any statement. (Pet. App. C at 23, 30, 31-32).

The district court found that Fadell had produced no evidence of "actual malice" as defined in *New York Times Co. v. Sullivan*, *supra*, and that he "has not raised issues of material fact which, if resolved in his favor, would support a finding of 'actual malice'" Pet. App. C at 126.

The court of appeals affirmed. It examined the entire record in light of Fadell's contentions and found them meritless. The court adopted the opinion of the district court including the finding that the record "reflects no actual malice whatsoever as that term is contemplated in *New York Times v. Sullivan* and its progeny." (Pet. App. A at 6).

ARGUMENT

1. In granting summary judgment for respondents, the courts below applied well-established standards wholly consistent with the decisions of this Court as well as those of other courts of appeals. There is, thus, no reason for this Court to grant certiorari.

The district court made a detailed analysis of the extensive factual record. The undisputed facts, as reflected in the court's Memorandum Opinion and its Findings, demonstrated that respondents had a factual basis, either from interviews, documents or, in most cases, both, for each of the challenged statements made

in the article. There was no evidence that any of the respondents knew or believed any statements to be false or had any doubts as to their accuracy. Thus, the undisputed facts precluded a showing of "actual malice" which Fadell is required to make in order to prevail. *E.g. New York Times Co. v. Sullivan, supra, Garrison v. Louisiana*, 379 U.S. 64 (1974); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

Contrary to Fadell's contention, the courts below did not require that he "actually prove the existence of actual malice in order to proceed to trial" (Pet. 26). The only burden imposed was to raise disputed issues of fact which, if resolved in his favor by a jury, would support a finding of "actual malice." As the courts found, he was unable to do so. The district court said:

"The Court concludes that the plaintiff has not raised issues of material fact which, if resolved in his favor, would support a finding of 'actual malice' and therefore summary judgment must be granted for the defendants." (Pet. App. C at 126).

Indeed, after the exhaustive discovery conducted in this case including Fadell's microscopic examination of all the source material for the article and his lengthy examinations of Crile and of the *Harper's* editors, executives, and counsel, he was unable to produce any evidence of malice (Pet. App. A at 5-6; Pet.

App. C at 23, 30-31). Thus, summary judgment was proper.*

2. As a second ground for seeking certiorari, Fadell contends that the courts below ignored evidence of malice which he claims to have produced through numerous affidavits.* This argument amounts to no more than a dispute, resolved against him by two courts below, over the factual materials in the record.

* The standard applied was not only consistent with Rule 56, Fed. R. Civ. P. but also with numerous cases holding that summary procedures are particularly favored in the First Amendment area because of the chilling effect of even ultimately unsuccessful libel actions. *See, e.g., Thompson v. Evening Star Newspaper Co.*, 394 F.2d 774, 776 (D.C. Cir.), *cert. denied*, 393 U.S. 884 (1968); *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966). *See also, Grzelak v. Calumet Publishing Co.*, 543 F.2d 579 (7th Cir. 1975); *Gospel Spreading Church v. Johnson Publishing Co.*, 454 F.2d 1050 (D.C. Cir. 1971); *Medina v. Time, Inc.*, 439 F.2d 1129 (1st Cir. 1971); *Miller v. News Syndicate Co.*, 445 F.2d 356 (2nd Cir. 1971); *Sellers v. Time, Inc.*, 423 F.2d 887 (3rd Cir. 1970), *cert. denied*, 400 U.S. 830 (1970); *Time, Inc. v. Johnson*, 448 F.2d 378 (4th Cir. 1971); *Bon Air Hotel v. Time, Inc.*, 464 F.2d 986 (5th Cir. 1972); *United Medical Laboratories, Inc. v. CBS*, 404 F.2d 706 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969).

* Fadell argues that he proved, through affidavits, that a number of Crile's sources denied that they were sources for the disputed statements in the article. (Pet. 29). The record shows that in no case did any source deny making a statement which Crile attributed to him. In its Memorandum Opinion and its Findings of Fact and Conclusions of Law, Pet. App. C at 1-126, the district court dealt extensively with the affidavits submitted by Fadell and properly found that they contain no evidence of malice.

Not only is it without merit, but this is not an issue of sufficient importance to cause this Court to grant certiorari.

Fadell cites four instances in which he claims to have produced evidence of malice on the part of Crile.⁷ However, a review of the district court's findings demonstrates that the court considered all of the "evidence" submitted by Fadell and correctly concluded that he did not raise issues of fact on the question of malice.

(a) Fadell claims that Crile knowingly published a false figure for the assessment of the *Post-Tribune* building in an effort to establish a relationship between the paper and Fadell. In Finding No. 35, covering five pages, (Pet. App. C at 78-83) and Conclusion No. 9, (Pet. App. C at 125) the district court reviewed the undisputed fact that Crile obtained the figure used in the article from an assessment record which he, and a former employee of the Assessor's Office, believed to be for the *Post-Tribune* building. He reported the figure to the publisher of the *Post-Tribune* who never denied or corrected it. He was refused an opportunity to review the *Post-Tribune* tax

⁷ Petitioner does not attempt to dispute in any respect the conclusion of the district court that "Harpers . . . not only had no knowledge that any statement in the article was false; it is clear that Harper's did not entertain doubts respecting the truth of any statements, and had no awareness whatsoever of probable falsity of any part of the article." Pet. App. C at 23; see also 38-41.

records and he was never given the correct figure. Although the figure used was later shown to be inaccurate, the courts below properly found that there was no evidence of malice.

(b) Fadell claimed that Crile recklessly mischaracterized a reduction in the assessed value of properties owned by a water company. In Finding No. 29, covering two pages, (Pet. App. C at 57-60) the district court found that it was undisputed that Crile took the assessment figures appearing in the article from public records and confirmed his conclusions as to the effect of those assessments through at least two interviews.

(c) Fadell claims that Crile acted with malice in stating that Fadell had the power to increase the assessment of the United States Steel plant in Gary. Finding No. 33 (Pet. App. C at 70-75) reviewed the numerous sources Crile relied upon for this conclusion.

(d) Fadell claims that Crile acted recklessly in stating that he had destroyed records of the Assessor's Office. Finding No. 37 (Pet. App. C at 87-93) sets forth the undisputed facts on this issue including excerpts from five tape recorded interviews with people involved in the destruction.

Thus, in each instance, the court considered the "evidence" offered by Fadell and found that it did not raise disputed issues of fact on the question of malice. As the court of appeals observed:

"We note finally that although plaintiff attempts to surmount the obstacles imposed by *New York Times*, his major thrust continually goes to the truth or falsity of the published statements rather than to the basic problem of whether they were published with actual malice." Pet. App. A at 6.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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